

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

77-1342

77-1342

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1342

UNITED STATES OF AMERICA,

Appellant,

—v.—

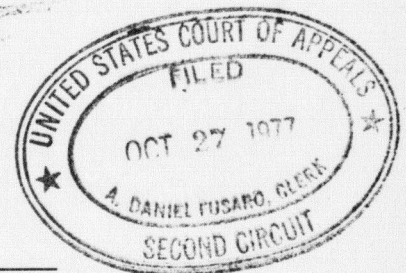
DOUGLAS P. FIELDS, FREDERICK M. FRIEDMAN,
PETER S. DAVIS, ALAN E. SANDBERG, and ERIC
BERGE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL APPENDIX OF APPELLEES
FIELDS AND FRIEDMAN

BENDER & FRANKEL
Attorneys for Appellees
Fields and Friedman
225 Broadway
New York, New York 10007



PAGINATION AS IN ORIGINAL COPY

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OFFICE OF THE
GENERAL COUNSEL

SA-1

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

October 11, 1977

David Levenson, Esquire
Finkelstein, Thompson & Levenson
1800 M Street, N. W.
South Lobby, Suite 825
Washington, D. C. 20036

Re: Freedom of Information Act ("FOIA") Request on behalf of
Glenn Woo, No. 77-707.

Dear Mr. Levenson:

We regret our delay in responding to your letter of August 23, 1977 and Mr. Thompson's letter of September 13, 1977, both on behalf of Mr. Glenn Woo. In those letters you requested access to any and all documents pertaining to the Commission's inquiry into matters found by Judge Haight in his opinion dated June 3, 1977 in United States v. Fields, 76 Cr. 1022-CSH (S.D.N.Y.) [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,074, regarding alleged misconduct by certain Commission employees.

Although an initial decision had been made to conduct the inquiry to which you refer, we subsequently informally decided to defer the inquiry until the United States v. Fields case is concluded. Therefore, as far as we can determine, the Commission staff has not prepared any documents on the matter.

Under these circumstances, there would appear to be little purpose for seeking de novo review of this matter in federal district court. We are, however, of the view that you have exhausted the administrative remedies available to you under the FOIA, and accordingly, as provided in the FOIA, I hereby advise you that you have the right to seek judicial review of this determination by instituting an action in the United States District Court for the District of Columbia or in the District where your client resides or has his principal place of business. See 5 U.S.C. 552 (a)(4)(B).

Sincerely,

Harvey L. Pitt
Harvey L. Pitt
General Counsel

SA-2

FINKELSTEIN, THOMPSON & LEVENSON

1800 M STREET, N. W.

SOUTH LOBBY, SUITE 825

WASHINGTON, D. C. 20036

BURTON H. FINKELSTEIN
DOUGLAS G. THOMPSON, JR.
DAVID J. LEVENSON
DAVID M. LEWIS
JOHN F. MCCARTHY III

TELEPHONE: (202) 331-0600
CABLES: "LEDROIT"

August 23, 1977

Roderic L. Woodson, Esq.
FOIA Officer and Special Counsel
Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Dear Mr. Woodson:

On behalf of Glenn F. Woo, pursuant to the Freedom of Information Act, we hereby request access to any and all documents pertaining to the Commission's inquiry into the matters found by Judge Haight in his opinion dated June 3, 1977 in *United States v. Fields*, 76 Cr. 1022-CSH (S.D.N.Y.). [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,074. The inquiry is referred to in Judge Haight's opinion upon rehearing, dated July 7, 1977, wherein he observed that Wallace L. Timmeny, Associate Director of the Division of Enforcement represented (as quoted in an affidavit submitted by the government): "that, on the basis of the Court's prior findings, 'the Commission has undertaken an independent inquiry in this mater [sic]....'" [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,110, at 92,000.

Sincerely,

David J. Levenson

David J. Levenson

Exhibit A

RECEIVED

SEP 13 1977

 In the Matter of

 GLENN WOO

SEC. & EXCH. COMM.
 FOIA OFFICE
 FREEDOM OF INFORMATION ACT
 APPEAL

Glenn F. Woo, by and through his undersigned attorneys, pursuant to 17 C.F.R. §200.80(d)(6) and 5 U.S.C. §552, hereby respectfully submits this application for an order of the Commission determining and directing that he be given access to any and all documents pertaining to the Commission's inquiry into the matters found by Judge Haight in his opinion dated June 3, 1977 in *United States v. Fields*, 76 Cr. 1022-CSH (S.D.N.Y.). [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,074. The inquiry is referred to in Judge Haight's opinion upon rehearing, dated July 7, 1977, wherein he observed that Wallace L. Timmeny, Associate Director of the Division of Enforcement represented (as quoted in an affidavit submitted by the government): "that, on the basis of the Court's prior findings, 'the Commission has undertaken an independent inquiry in this mater [sic]....'" [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,110, at 92,000.

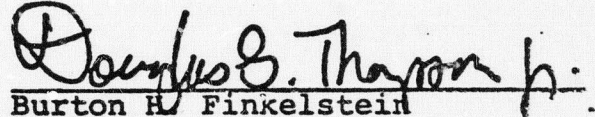
The reasons in support of this application are as follows: By letter dated and hand-delivered August 23, 1977, the undersigned attorneys requested the above documents, on Mr. Woo's behalf. A copy of that letter is attached hereto. More than ten (10) days have passed without any response to this request. Pursuant to 17 C.F.R.

§200.80(d)(6), this failure to respond provides the basis
for this application.

Dated: September 13, 1977

Respectfully submitted,

FINKELSTEIN, THOMPSON & LEVENSON



Burton H. Finkelstein
David J. Levenson
Douglas G. Thompson, Jr.
1800 M Street, N.W.
Washington, D.C. 20036
202/331-0600

Attorneys for Applicant

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DOUGLAS P. FIELDS

122 EAST 42ND STREET
NEW YORK, N. Y. 10017

(212) 972-1510

June 20, 1977

Mr. David Chard
Chemical Bank
20 Pine Street
New York, New York
10005

Dear Dave:

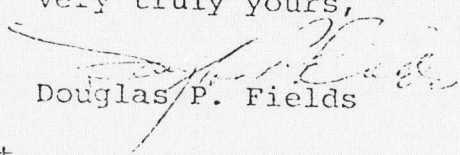
Pursuant to the Final Judgment of Permanent Injunction and Order of Ancillary Relief entered with my consent with the Clerk of the United States District Court for the Southern District of New York on February 5, 1976 (the "Judgment and Order"), in settlement of the litigation entitled Securities & Exchange Commission v. TDA Industries, Inc., et al, I am obligated to pay to TDA Industries, Inc. (a portion of which is to be credited to Westcalind Corp.), a final sum of \$91,916.67, to be paid no later than August 1978. In discussions with TDA's Chief Executive Officer, I have decided to pay the remaining sum prior to June 30, 1977.

Please sell the \$95,000 face amount Treasury Bills dated December 14, 1976 and due December 13, 1977 that you are holding as collateral securing my obligation at the best available price on the open market and credit the entire proceeds to my checking account No. 001-289470 on June 27, 1977. Simultaneously, debit my aforesaid checking account in the amount of \$91,916.67 and transfer that sum to the account of TDA Industries, Inc., Account No. 001 041169. Charge any service charges to my personal checking account.

It is extremely important that the aforesaid Treasury Bills be sold and the funds transferred into the account of TDA Industries, Inc. prior to June 30, 1977.

Thank you very much for your assistance in this matter.

Very truly yours,


Douglas P. Fields

DPF:sdd

cc: Edward A. Lampert, Escrow Agent
Herbert C. Kantor, Esq.
Milton S. Gould, Esq.
Louis Bender, Esq.
Frederick M. Friedman, Treasurer of TDA Industries, Inc.

SA-6

CHEMICAL BANK

191,911.37

Charge Ticket 5

20 Pine St. CD#2

New York

Date
6/28/77

91,911.37

Units

Tr Code
682

Clk	Officer

Account Number

001-289470

Charge

Douglas Fields
122 E. 42nd St.
NY NY 10017

Details

as per your letter instructions
of 6/20/77.

020373* (6-75) 1-77

001289470

68,0009191667

CHEMICAL BANK

Advice 2

20 Pine St. CD#2

New York

Account Number

001-041169
TDA Industries, Inc.

Date

6/28/77

\$1,916.67

We Credit Your Account As Per Details Below

as per Douglas Fields letter
instructions of 6/20/77.

FORM 10-K

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Annual Report Pursuant to Section 13 or 15(d) of
the Securities Exchange Act of 1934

For the fiscal year ended June 30, 1975

Commission File No. 0-4088

TDA Industries, Inc.
(Exact name of registrant as specified in its charter)New York
(State or other jurisdiction of
incorporation or organization)11-2117396
(IRS Employer Identification
Number)122 East 42nd Street, New York, N.Y.
(Address of principal executive office)10017
(Zip Code)Registrant's telephone number, including area code (212) 972-1510

Securities registered pursuant to Section 12(b) of the Act:

Title of each className of each exchange on
which registeredNoneNone

Securities registered pursuant to Section 12(g) of the Act:

Common Shares, \$.20 Par Value

Indicate by check mark whether the registrant (1) has filed all
annual, quarterly and other reports required to be filed with the Commission
and (2) has been subject to the filing requirements for at least the past
90 days.

YES XNO

and its subsidiaries exceeded \$40,000, and the aggregate direct remuneration of all officers and directors, as a group during the last fiscal year:

<u>Name</u>	<u>Capacities in which Remuneration was Received</u>	<u>Aggregate Direct Remuneration(1)</u>
Douglas P. Fields	Chairman of the Board and President	\$128,480
Edward A. Lampert	Vice Chairman of the Board and Executive Vice President	74,194
Frederick M. Friedman	Financial Vice President, Treasurer, Secretary and Director	72,000
Gerald Gelles	Vice President and Director	65,200 (2)
All Officers and Directors as a group (10 persons)		377,805

- (1) Does not include a cost of living adjustment described in paragraph (c) below.
- (2) Does not include a \$25,000 bonus for services rendered during the fiscal year ended June 30, 1975. See paragraph (c) below.

(b) A contribution to a qualified profit sharing plan and a qualified pension plan of a subsidiary of the Registrant has been made in the amount of approximately \$19,600 to each plan for each of Messrs. Fields, Lampert, Friedman and Gelles for the Registrant's fiscal year ended June 30, 1975. Through such date, contributions of approximately \$68,900, \$82,680, \$67,400 and \$94,090 have been made to qualified profit sharing or pension plans of subsidiaries of the Registrant since inception of these plans for the benefit of Messrs. Fields, Lampert, Friedman and Gelles, respectively.

(c) Messrs. Fields, Lampert, Friedman and Gelles have each entered into employment agreements with the Registrant and its subsidiaries, providing for base annual compensation, respectively, as follows: \$128,480, \$98,925, \$72,000 and \$65,200. Such amounts are subject to cost of living increases to be determined each year as defined in the respective

employment agreements. The employment agreements with Messrs. Fields, Friedman and Gelles expire July 1, 1983 and the employment agreement with Mr. Lampert expires on August 31, 1978 but is subject, at his option, to be extended for two additional five-year terms.

Messrs. Fields, Lampert, Friedman and Gelles, as a group, have been granted a one-time retroactive cost of living adjustment for the three year period ended June 30, 1975, and such adjustment has been allocated among the group and accrued during the past year in the amount of \$36,860 to each of Messrs. Friedman and \$18,429 to each of Messrs. Lampert and Gelles.

See Item 15, "Interest of Management and Others in Certain Transactions", for information concerning other compensation.

Item 14. Options Granted to Management to Purchase Securities.

No officer or director of the Registrant was granted or exercised an option to purchase any securities from the Registrant since July 1, 1974 and no options were held by any such persons as of September 19, 1975.

Item 15. Interest of Management and Others in Certain Transactions.

Gerald Gelles and members of his family lease certain warehouse facilities to a subsidiary of the Registrant. The current aggregate rentals for such facilities are \$44,200 and such leases expire in March, 1980. The Registrant believes that the present rental is comparable to rentals paid for similar properties in the surrounding area.

Certain entities in which Edward A. Lampert and members of his family own significant interests have leased, since October, 1969, certain warehouse facilities to a subsidiary of the Registrant. The current aggregate rentals for such facilities are \$88,068. Such leases expire in September, 1979 and may be extended for an additional term of ten years. The Registrant believes that the present rental is comparable to rentals paid for similar properties in the surrounding areas.

On January 29, 1975, the Registrant purchased an aggregate of 22,950 Series B Preferred Shares from the Estate of Harry Lampert, deceased father of Edward A. Lampert, Vice Chairman, Executive Vice President and a Director of the Registrant, for an aggregate consideration of \$220,000. On July 8, 1975, the Board of Directors of the Registrant authorized the purchase by the Registrant of 10,000 of its Series B Preferred Shares owned by a trust for the benefit of Edward A. Lampert at an aggregate purchase price of \$200,000, plus accrued dividends through August 31, 1975. These purchases have relieved the Registrant from its obligation to pay dividends in the aggregate amount of \$26,360 annually. In addition, these purchases have relieved the Registrant of its contractual obligation to redeem or repurchase these Series B Preferred Shares for an aggregate amount of \$659,000 during the five-year period commencing October 1, 1978, subject to certain limitations.

During its fiscal year ended June 30, 1975, the Registrant received management fees from Westcalind Corp., an unconsolidated affiliate, for management services rendered largely by Messrs. Fields, Lampert, Friedman and Gelles, which fees have been allocated and paid to each of them in the amount of \$12,000, respectively. In addition, Messrs. Fields and Friedman, in their respective capacities, as Chairman of the Board of Westcalind Corp. and as Treasurer of its only operating subsidiary, received compensation from Westcalind Corp. of \$4,000 and \$13,000 during the fiscal year ended June 30, 1975.

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SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

Annual Report Pursuant to Section 13 or 15(d) of
the Securities Exchange Act of 1934

For the fiscal year ended June 30, 1976

Commission File No. 0-

TDA Industries, Inc.
(Exact name of registrant as specified in its charter)

New York
(State or other jurisdiction of
incorporation or organization)

11-2117396
(IRS Employer Identification Num)

122 East 42nd Street, New York, N.Y.
(Address of principal executive office)

10017
(Zip Code)

Registrant's telephone number, including area code (212) 972-1510

Securities registered pursuant to Section 12(b) of the Act:

Title of each class

Name of each exchange on
which registered

None

None

Securities registered pursuant to Section 12(g) of the Act:

Common Shares, \$.20 Par Value

Indicate by check mark whether the registrant (1) has filed all
annual, quarterly and other reports required to be filed with the Commission
and (2) has been subject to the filing requirements for at least the past 90
days.

YES X

NO

highest paid officers whose aggregate direct remuneration from the Registrant and its subsidiaries exceeded \$40,000, and the aggregate direct remuneration of all officers and directors as a group during the last fiscal year:

<u>Name</u>	<u>Capacities in which Remuneration was Received</u>	<u>Aggregate Direct Remuneration (1)</u>
Douglas P. Fields	President	\$139,437
Edward A. Lampert	Chairman of the Board and Executive Vice President	108,797
Frederick M. Friedman	Financial Vice President, Treasurer and Secretary	78,552
Gerald Gelles	Vice President	72,071
All Officers and Directors as a Group (7 persons)		400,453

(1) See Paragraph (c) below and Items 14. and 15. for information concerning additional compensation.

(b) A contribution to a qualified profit sharing plan and a qualified pension plan of a subsidiary of the Registrant has been made in the amount of approximately \$20,500 to each plan for each of Messrs. Lampert, Fields, Friedman and Gelles for the Registrant's fiscal year ended June 30, 1976. Through such date, contributions of approximately \$103,180, \$89,400, \$87,900 and \$114,590 have been made to qualified profit sharing or pension plans of subsidiaries of the Registrant since inception of these plans for the benefit of Messrs. Lampert, Fields, Friedman and Gelles, respectively.

(c) Messrs. Lampert, Fields, Friedman and Gelles have each entered into employment agreements with the Registrant and its subsidiaries, providing for base annual compensation,

respectively, as follows: \$98,925, \$128,480, \$72,000 and \$65,200. Such amounts are subject to cost of living increases to be determined each year as defined in the respective employment agreements. The employment agreements with Messrs. Fields, Friedman and Gelles expire July 1, 1983 and the employment agreement with Mr. Lampert expires on August 31, 1978 but is subject, at his option, to be extended for two additional five-year terms.

During the fiscal year ended June 30, 1975, Mr. Gelles received a bonus of \$25,000 pursuant to agreement with the Registrant respecting its Florida operations. In addition, Messrs. Lampert, Fields, Friedman and Gelles each received a bonus in the amount of \$25,000 for services rendered during the fiscal year ended June 30, 1976.

See Item 15, "Interest of Management and Others in Certain Transactions", for information concerning other compensation.

Item 14. Options Granted to Management to Purchase Securities.

No officer or director of the Registrant was granted or exercised an option to purchase any securities from the Registrant since July 1, 1975 and no options were held by any such persons as of September 21, 1976.

Item 15. Interest of Management and Others in Certain Transactions.

Gerald Gelles and members of his family lease certain warehouse facilities to a subsidiary of the Registrant. The current aggregate base rentals for such facilities are \$44,200 and such leases expire in March, 1980. The Registrant believes that the present rental is comparable to rentals paid for sim-

ilar properties in the surrounding area.

Certain entities in which Edward A. Lampert and members of his family own significant interests lease certain warehouse facilities to a subsidiary of the Registrant. The current aggregate base rentals for such facilities are \$88,068. Such leases expire in September, 1979 and may be extended for an additional term of ten years. The Registrant believes that the present rental is comparable to rentals paid for similar properties in the surrounding areas.

During its fiscal year ended June 30, 1976 the Registrant received management fees from Westcalind Corp., an unconsolidated affiliate, for management services rendered largely by Messrs. Lampert, Fields, Friedman and Gelles, which fees have been allocated and paid to each of them in the amount of \$12,000, respectively. In addition, Messrs. Fields and Friedman, in their capacities as officers of Westcalind Corp. and of its only operating subsidiary, received compensation from Westcalind Corp. of \$20,333 and \$18,000, respectively, during the fiscal year ended June 30, 1976.

rkb-7

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2 THE COURT: If fairness is an issue, and if
3 it is an issue which, as some of the defendants suggest,
4 was raised in the course of these proceedings, perhaps
5 at an earlier moment than Mr. Cutner presently acknowledges;
6 if fairness is the issue, aren't these defendants coming
7 into the court as a court of equity and asking that fairness
8 be done to them and if that is not true, why isn't it
9 open to the Government to show factors which reflect and
10 bear upon the fairness or comportment or behavior of these
11 defendants? They are asking in essence for the introduction
12 of a court of equity.

13 Isn't there a "clean hands factor" here as
14 far as they are concerned?

15 MR. BENDER: Your Honor, I didn't mean in
16 anything I said to any way insulate our clients from such
17 a doctrine, not at all. I am only saying, what the Govern-
18 ment claims would reflect an unclean hands attitude just
19 doesn't exist in this case merely because they have determ-
20 ined outside of the SEC at some time subsequently when they
21 got the case that there may be some evidence to indicate,
22 at least prima facie, that there is a manipulation
23 charge, but that doesn't show that we acted with unclean
24 hands in failing to disclose something to the SEC about
25 which we had no reason to believe we were even suspected

rkb-8

1126

of doing anything in violation of an SEC law; we had no knowledge that we violated any law.

How does the Government submit to show that we had unclean hands? Are they going to claim that we knew at the time that our people came in on January 14th that we knew were were manipulating stock and had violations?

THE COURT: Who do you mean by "we"? The attorneys?

MR. BENDER: The defendants, Fields and Friedman.

THE COURT: If they were dealing with Zammass and these other people and manipulating stock, they sure knew it.

MR. BENDER: How would they know they were manipulating stock unless they were manipulating stock?

In other words, if somebody says we think you killed somebody and we did not kill that person, does the Government now propose to show in this hearing that on January 14, 1975, Fields and Friedman knew that they had engaged in manipulations in 1971 with Zammass and Georges? Is that what they propose to do?

If they propose to do that, we submit to you, we propose to show that we did not believe in anything we did was any manipulation.

rkb-4

Wing-direct

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THE COURT: I will take the answer.

Q Did you thereafter receive, after whatever contact you had, did you thereafter receive the pleadings in the case?

A Yes, I did.

Q What did you do with the pleadings?

A Well, initially I just held them in my office for a period of time, and I don't really recall how long it was, and at some point I reviewed them and spoke with Tom Edwards about them. Edwards was the chief of the criminal division.

At the time, the unit, the fraud unit was extremely overworked and there was no one to assign the case to and eventually Edwards and I decided to assign it to Mr. Cutner, who was not then in that unit, but who had a couple of securities fraud cases.

Q Can you tell us what you were working on in December of 1975?

MR. BENDER: I object to that, your Honor.

THE COURT: I will take the answer.

A I was getting ready to try a case, United States against John King, which was scheduled to go to trial in the middle of January.

Q Did the case in fact go to trial in the middle

rkb-5

Wing-direct

1281

1
2 of January?

3 A In early January it got adjourned to late April.

4 Q Did the TDA case eventually get assigned to
5 Mr. Cutner?

6 A It did.

7 Q Do you have a recollection of when approximately
8 that happened?

9 A I don't have a present recollection. I read
10 a memorandum which precisely sets the date as February
11 27, 1976.

12 Q Does that refresh your recollection of the
13 approximate time at which it got assigned to Mr. Cutner?

14 A That is correct.

15 Q At the time the case was assigned to Mr. Cutner,
16 can you tell us, if you know, what unit Mr. Cutner was
17 assigned to?

18 A It was called "long trials".

19 Q Did there come a time thereafter when Mr.
20 Cutner. changed units?

21 A At some point in March, I am not sure when, he
22 came into the fraud unit.

23 Q At that time, were you his supervisor?

24 A Yes.

25 Q Do you know what Mr. Cutner was doing in

rkb-6

Wing-direct

1282

March and April of 1976?

A He was working on a case, United States against Rappaport.

Q Did that case go to trial?

A It did.

Q When did it go to trial, approximately?

A Some time around April.

Q The time you received the pleadings in the TDA case from the SEC, did you know what stage the settlement negotiations were in?

A I have no idea.

Q Did you know what the arrangements were between the SEC and Mr. Fields, Mr. Friedman and Mr. Davis with respect to the posting of collateral?

A I knew nothing about any of that.

Q Mr. Wing, did you intentionally delay investigation of the TDA case to allow the SEC to solidify the financial aspects of its civil settlement?

A Absolutely not.

Q At some time after you received the pleadings in December of 1975, did you make a request in writing for the TDA files?

A I don't think I did. I have looked through my reading file and I can't find the letter, so I assume

rkb-2

Perlmutter-direct

1 Tucker was present, Mr. Goldman was present and there was
2 an individual there who I do not recall his name, but he
3 was introduced to me as a partner of Mr. Butowsky and
4 that he was a former partner of Mr. Gould.
5

6 What I recall is, I was there very briefly and
7 the only thing that I recall that was said during the period
8 of time I was there was that Mr. Butowsky was telling Mr.
9 Tucker some story about Vesco, and that is the only thing
10 I recall.

11 I then left, I had some other things to take
12 care of and when I was there, there was no substantive dis-
13 cussion about TDA.

14 Q Did there come a time during the discussion
15 when you were present and there was some talk about a possible
16 criminal reference or criminal prosecution?

17 A There was no such discussion when I was present
18 at that meeting.

19 Q I am still talking about the same meeting.
20 Did you indicate one way or the other what the SEC's
21 position was or would be concerning a criminal reference?

22 A Absolutely --

23 MR. FRANKEL: Is that with reference to TDA?

24 THE COURT: I believe so.

25 MR. FRANKEL: Then I will object to the question

rkb-6

Perlmutter-direct

1466

entered into by the defendants with the SEC was.

The fact they were maintained at the company, and in Mr. Fields' case at a salary of close to \$140,000 a year, has some bearing on the suffering, if that is the proper word, that he had to have in light of the judgment of the SEC.

THE COURT: Maybe the company was booming and he earned every cent of it.

I think it takes us too far afield. I sustain the objection.

MR. CUTNER: If I could just add one further thing on that point, your Honor.

There has been a good deal of testimony here with respect to the objectives of the defendants and the objectives of defense counsel in dealing with the SEC and there has been some testimony as to one of the two primary objectives to maintain Mr. Fields and Mr. Friedman at the company --

MR. BENDER: Excuse me for interrupting, does the witness have to be here to hear this? If it is going to pertain to anything about which we might go into on cross--

MR. CUTNER: I am not going into it on direct.

MR. BENDER: Then may we have the witness excused.

mkds

1840

1 mkds
2 They also noted something to the same effect
3 in a footnote in a pre-hearing letter to your Honor, and
4 although it seems like an attempt again to blacken generally
5 some or all of the defendants, it has nothing to do, first
6 of all, with the issue that is before your Honor.

7 Second of all -- and these are really, I
8 think, in ascending order of importance -- second of all,
9 there is no evidence to that effect in the record -- simply
10 this gratuitous observation in the government's memo.

11 If there was such evidence, and if the govern-
12 ment believed that it was relevant to one or more of the
13 issues before your Honor, then the government was under an
14 obligation, I think, if it wants to raise any argument from
15 that allegation, to introduce some facts in support of it.

16 Third of all -- and this statement I just
17 make to your Honor based on information given to us -- this
18 matter was a matter that was squarely brought to the atten-
19 tion of the District Attorney's Office for New York County
20 which we are further given to understand did an investigation
21 of this matter, including electronic surveillance and over-
22 hearing.

23 Your Honor knows that at the conclusion of
24 the DA's investigation, it had concluded that there were
25 no offenses, no provable offenses committed by any defendants

1 mkds

2 cognizable under the laws of the State of New York.

3 Now if there was a provable obstruction or
4 provable threats of any type, those certainly would have
5 been offenses cognizable under the laws of New York, and
6 nevertheless the District Attorney's Office concluded that
7 there were no such offenses.

R2 8 For all of those reasons we ask that your
9 Honor either in the same manner deem this observation here
10 stricken, or at least that your Honor disregard in all
11 respects that observation, for all the reasons that I stated.

12 MR. NAFTALIS: Your Honor, I would like to
13 add something to that. I would like to associate myself
14 with Mr. Frankel's remarks, that simply ipso-dixy there is
15 no evidentiary basis by the government in the record; it is
16 contrary to some of the statements in the record.

17 Second of all, it would have no relevance
18 in this matter unless there was evidence as you said at
19 this hearing that the reason why Mr. Tucker and Mr. Perl-
20 mutter kept their counsel and failed to disclose these
21 matters to the defendants, was due to the fact that they
22 were concerned about people running off to Brazil, or doing
23 something of that sort.

24 Now obviously there is certainly no evidence
25 of that sort, and whatever motivated Mr. Tucker and

1 mkds

2 Mr. Permutter to conceal the existenece of the referral,
3 it certainly wasn't this, and it seems to me putting this
4 in is a red herring, and I would join in Mr. Frankel's
5 request.

6 THE COURT: When I first read this reference
7 in the brief at page 32, my reaction was that it was attempt-
8 ing to have me focus on the matter for which there was no
9 evidence in the record whatsoever, and so my inclination was
10 and is to disregard it.

11 If you feel I should do otherwise, Mr. Cutner,
12 you can deal with that in your own remarks when you make
13 them.

14 My present instinct is to disregard this
15 reference as dehors the record.

16 I should say for the sake of scheduling, that
17 I must go on and do something else shortly after noon,
18 so the defense will keep their eye on the clock and go until
19 about 11:15, and the government will have, 11:15 to 12:15.

20 There are some limitations on my time.

21 MR. FRANKEL: I will try to proceed with that
22 in mind, your Honor.

23 Our argument will depend in part on the
24 factual determination that your Honor will make, and in
25 that connection it is significant, I think, to note some

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2 I have started with the remedy here, because
3 one, I think as I have already said, I think it is the
4 place where the defendants' arguments falter, but I started
5 with it also because in viewing the facts and circum-
6 stances of the case, I say that we want to measure or we
7 should measure the facts and circumstances against the type
8 of standards and the types of circumstances that have
9 been developed in the case law for dismissing indictments.

10 The issue here is not did the SEC behave
11 badly or not. The issue is not whether we approve or
12 disapprove of the SEC's conduct, I submit. For example,
13 if your Honor were to find that what happened in this
14 case is precisely what the defendants in their findings
15 submit it was.

16 Let's assume that those facts were true.

17 THE COURT: Fraud, deceit and all that.

18 MR. CUTNER: I certainly could not understand
19 up here as a lawyer, a government lawyer and an officer
20 of the court, and say that I think that is fine. Of
21 course I would disapprove of that sort of thing. I do dis-
22 approve of it if that's what happened. But it still
23 seems to me that even if that is what happened, and I don't
24 mean for a minute to suggest that I join in any finding
25 of intentional fraud or anything else that is being claimed

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2 the same. I don't think there is any evidence of
3 Mr. Berge's reliance on any dealings by his counsel
4 with the SEC. There just isn't any basis for an under-
5 standing, promise, commitment or whatever, as to
6 Mr. Berge.

7 That's all I have to say, your Honor, unless
8 your Honor has some questions.

9 THE COURT: No.

10 MR. CUTNER: Wait a minute. There is the
11 question of the manipulation aspect of it that was raised.

12 I guess I can answer the question as to
13 Mr. Davis this way: If all the government were left with
14 in Count One or in the indictment were the manipulation
15 aspect of the case, we would not be able to proceed against
16 Mr. Davis.

17 THE COURT: All right. Thank you.

18 Gentlemen, I am going to have to regard
19 this case as fully submitted as of this time. I think
20 that I have a full appreciation of the points that are
21 made on behalf of all parties, as a result of these very
22 helpful briefs and this helpful oral argument.

23 I must get to a Judges' meeting now, but I
24 would not be prompt at that meeting if I felt that I
25 needed more assistance from counsel, but I think that I

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2 fully understand all the arguments.

3 MR. BENDER: Could we ask in view of the
4 concession that Mr. Cutner gave with respect to Davis on
5 the Zammias transaction, whether that likewise applies
6 to the defendant Friedman?

7 THE COURT: What do you say to that?

8 MR. CUTNER: That would also be true.

9 THE COURT: Also apply to Mr. Friedman.

10 MR. CUTNER: I think the only defendant we
11 would be able to proceed on solely on that aspect of
12 the case would be Mr. Fields.

13 THE COURT: Thank you, Mr. Bender. I had
14 that in mind but I forgot to ask it.

15 My intention is to have counsel come back
16 and hear the Court's decision in this matter within the
17 next several days. I will tell you now that the oral
18 decision announced from the bench will be an operative
19 order, but it will not contain within it all the author-
20 ities and the findings of fact, conclusions of law and
21 reason for the decision.

22 I am not quite sure when that full opinion is
23 going to be ready, but I am very concerned, in view of
24 the timetable, that the Court's decision be made known to
25 counsel as quickly as possible. So I am going to make



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